CITY OF TANANA
TOZITNA LTD.

IBLA 85-279 August 4, 1987

Appeals from a December 19, 1984, decision of the Alaska State Office, Bureau of Land Management, reserving public easements across Native village selections F-14944-A and F-14944-B.

Affirmed.

1. Alaska Native Claims Settlement Act: Appeals: Standing -- Rules of Practice: Standing to Appeal

   A party has standing to appeal a Department decision relating to land selections under the Alaska Native Claims Settlement Act, as amended, if the party claims a property interest in land affected by the decision, such as the right to use an existing right-of-way pursuant to a right-of-way use agreement.

2. Alaska Native Claims Settlement Act: Conveyances: Easements -- Alaska Native Claims Settlement Act: Easements: Public Easements

   When the United States reserves sec. 17(b) public easements in conveyances to village and regional corporations under the Alaska Native Claims Settlement Act, Department regulations specify that when an existing road is less than 60 feet, "existing road" easements shall be no more than 60 feet wide unless a greater width is justified by "special circumstances." The party alleging the special circumstances warranting a variance bears the burden of proving circumstances exist which necessitate reservation of an easement in excess of 60 feet in width.

3. Administrative Procedure: Burden of Proof -- Alaska Native Claims Settlement Act: Conveyances: Easements -- Alaska Native Claims Settlement Act: Easements: Decision to Reserve

   A party appealing a BLM easement determination made pursuant to the Alaska Native Claims Settlement Act bears the burden of showing error.

4. Alaska Native Claims Settlement Act: Conveyances: Easements -- Alaska Native Claims Settlement Act: Easements -- Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where BLM reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents should contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way if valid.

APPEARANCES: Patrick X. Moore, Mayor, City of Tanana; Robert H. Hume, Jr., Esq., for Tozitna Limited; James Q. Mery, Esq., for Doyon, Limited, amicus curiae; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Three issues are raised in these appeals from the December 19, 1984, Alaska State Office, Bureau of Land Management (BLM), decision finding certain lands proper for interim conveyance to Tozitna Limited (Tozitna). The City of Tanana (Tanana) challenges the BLM determination regarding the width of public easement EIN 1a C1, C3, C5, D1, L (EIN 1a) which had been reserved under section 17(b) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1616(b) (1976). Tozitna, the Native village corporation for the Native village of Tanana, which was organized pursuant to ANCSA, challenges the width of another section 17(b) public easement, EIN 1b, C1, C3, C5, D1, b, (EIN 1b). Finally, Doyon, Limited (Doyon), amicus curiae, 1/ and Tozitna object to BLM's statement in its decision to issue the conveyance, that the lands will be made subject to a claimed R.S. 2477 2/ right-of-way if valid.

In the December 19, 1984, decision, BLM reserved to the United States a 60-foot-wide easement for an existing road known as the Bear Creek Radio Relay Site access road and designated as EIN 1a. This road lies just east of the Village of Tanana, in sec. 16, T. 4 N., R. 22 W., Fairbanks Meridian, and continues northeasterly to the White Alice Communications Site, located in sec. 17, T. 5 N., R. 21 W., Fairbanks, Meridian. The road was built along the route of the original Tanana-Allakaket Trail, which joins those two villages. It connects with a continuation of the Tanana-Allakaket Trail which is identified as EIN 1b. The road is used by White Alice site employees and by hunters, trappers, and settlers

1/ Doyon is not an appellant as its statement of reasons was not filed in a timely manner. Its appeal was dismissed by order of the Board dated Mar. 25, 1985.

2/ R.S. 2477, 43 U.S.C. § 932 (1970), which was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2793, provided: "The right of way for the construction of highways over public lands not reserved for public uses, is hereby granted."

for access to public lands and resources to the north. According to Tanana it also serves as the only means of access for five families who use it as a dogsled or snowmobile route from the selection area to their homes.

Prior to reviewing other issues we will address the procedural challenges to Tanana's appeal. Tozitna argues that Tanana's appeal should be dismissed because the face of the City of Tanana's notice of appeal indicates "that it was filed with the Regional Solicitor's Office, and not with the BLM" (Answer at 3) (emphasis in original).

The applicable regulation, 43 CFR 4.411, provides that: "A person who wishes to appeal to the Board must file in the office of the officer who made the decision * * * a notice that he wishes to appeal." Although Tanana's notice was addressed to the "Regional Solicitor, BLM," it is clear from the January 18, 1985, BLM date stamp on the notice of appeal, that Tanana had also properly filed the notice of appeal with BLM, as required by 43 CFR 4.411.

Tozitna also argues that Tanana's appeal should be dismissed for a lack of standing to appeal. Tozitna states that "the City of Tanana is not an agency of the Federal Government or a regional corporation. Therefore, it may appeal only if it has a property interest in land affected by the decision. 43 CFR 4.410(b)" (Answer at 2). Tozitna argues that Tanana has no present or future property interest in the right-of-way. According to Tozitna, Tanana is "simply seeking to act on behalf of 'the public'" (Answer at 2).

[1] The applicable regulation on standing provides: "For decisions rendered by Departmental officials relating to land selections under the Alaska Native Claims Settlement Act, as amended, any party who claims a property interest in land affected by the decision, an agency of the Federal Government or a regional corporation shall have a right to appeal to the Board." 43 CFR 4.410(b) (emphasis added).

In its January 15, 1985, statement of reasons (SOR), Tanana claims a property interest in the access road reserved by EIN 1a. According to Tanana, this interest is derived from an agreement executed on April 22, 1983, in which the Air Force granted Tanana the right to use the access road. The agreement is known as the Consent Agreement to Joint Use of Department of Air Force Access Road Right-of-Way at Bear Creek Radio Relay Site.

In Henry W. Waterfield, 77 IBLA 270, 271 (1983), we held: "[P]ersons who hold property interests in public lands, such as mining claimants, permittees, lessees, and licensees, have standing." In the instant case, Tanana has the requisite claim of a property interest to meet the standing requirement of 43 CFR 4.410(b), by virtue of the April 22, 1983, Consent Agreement. Therefore, we dismiss both procedural challenges raised by Tozitna, and address the merits of the case.

[2] Tanana argues that the portion of easement EIN 1a passing through secs. 17, 19, and 20, T. 5 N., R. 21 W., Fairbanks Meridian, should be 100 feet wide. Tanana submits that "on the basis of the width designated in the above mentioned Consent Agreement and accompanying plat -- which predate

the [BLM decision] of December 19, 1984 -- the Right-of-Way should correctly remain at 100 feet in width" (SOR at 1). In addition, Tanana argues that a 100-foot wide easement is necessary in order to include both the access road and the parallel trail. Including the trail within the right-of-way is necessary, according to Tanana

> [b]ecause of the rather steep grades and blind corners on some sections of the road, the use of the surfaced portion of the ROW by both 4-wheeled and snowmobile/dogsled traffic poses a safety hazard at those times. Also, the plowing of the road surface down to gravel in early spring has on occasions in the past rendered that surfaced portion unusable to snowmobile/dogsled traffic. [Emphasis in original.]

(SOR at 2). Tanana argues that the right-of-way is the only surface access available for five families who depend on dogsled and snowmobiles almost exclusively for hauling supplies to their homes. Tanana concludes that the trail is necessary for the safe and efficient use of the site road right-of-way.

The Deputy Regional Solicitor argues on behalf of BLM that the use of the trail is not a proper basis for reserving a road easement wider than 60 feet. BLM argues that the reservation of section 17(b) easements is based upon "present existing use," defined as public use occurring on or before December 18, 1976, and that the recent use of the trail for access does not qualify as "present existing use." BLM also contends that 43 CFR 2650.4-7(b)(2)(iii) restricts the width of easements to 60 feet in the case of existing roads which are less than 60 feet wide.

"Present existing use" is the primary standard for determining which public easements are reasonably necessary for access. 43 CFR 2650.4-7(a)(3). However, Tanana challenges the width of the easement, not BLM's selection of easements. The width issue should be resolved by an analysis of "special circumstances" pursuant to 43 CFR 2650.4-7(a)(4). Notwithstanding this finding, we shall consider BLM's present existing use argument, as it is plausible that, by arguing for a wider easement to cover both the road and the trail, Tanana is arguing that BLM should reserve a second easement, parallel to the road easement, thereby challenging BLM's selection of easements.

The Secretary of the Interior, after consultation, is instructed by section 17(b) of ANCSA to "reserve such public easements as he determines are necessary." 43 U.S.C. § 1616(b)(3) (1976). United States Fish & Wildlife Service, 72 IBLA 218, 219 (1983). As previously stated, "present existing use" is the primary standard for determining which public easements are reasonably necessary for access. 43 CFR 2650.4-7(a)(3). However, a public easement may be reserved absent a showing of present existing use, if, among other circumstances not applicable to this case, there is no reasonable alternate route, or if it is necessary for access to publicly owned land. 43 CFR 2650.4-7(a)(3).

Appellant must show a "present existing use" of the trail to justify reserving a separate trail easement. This is because EIN 1a, connecting with

EIN 1b, provides access to public lands to the north, so that the "no reasonable alternate route" exception is not applicable to this easement reservation. 43 CFR 2650.4. "Present existing use" means use by either the general public (Natives and non-Natives), or by a Federal, State, or municipal corporation entity on or before December 18, 1976, or the date of selection, whichever is later. 43 CFR 2650.0-5(p). "Present existing use" contemplates "recent use and not past, historical use which may have long been abandoned." 43 FR 55326 (Nov. 27, 1978); see also 43 CFR 2650.0-5(p). The Tanana-Allakaket Trail is referred to as a "historic" trail by BLM (Answer at 3). However, to show present existing use, Tanana must prove recent use predating December 18, 1976. Tanana failed to submit probative evidence showing such trail use and therefore, has not established present existing use of this trail.

The Secretary is constrained to reserve only those easements that are necessary. 43 U.S.C. § 1616(b) (1976); United States Fish & Wildlife service, supra. Within the standard of reasonable necessity, the easements must be limited in number and not duplicative of one another. 43 CFR 2650.4-7(b)(ii). We conclude that since EIN la has been reserved, the reservation of a parallel trail easement would be duplicative. Therefore, even if appellant had proven present existing use of the trail, the decision of the Secretary to reserve only EIN la would have been proper.

There is no statutory restriction on the width of a transportation easement in ANCSA. The regulation adopted by the Department to implement ANCSA provides that "[A]ll public easements which are reserved shall be specific as to use, location and size. Standard sizes and uses which are delineated in this subsection may be varied only when justified by special circumstances." 43 CFR 2650.4-7(a)(4) (emphasis added). The regulation states that "the width of an existing road easement shall be no more than 60 feet," unless the existing road is wider than 60 feet. 43 CFR 2650.4-7(b)(2)(iii). There is no evidence or allegation that the existing road is more than 60 feet wide. In fact, Tozitna states that the road is "less than 40 feet" wide (Answer at 5).

The party challenging the BLM easement determination under ANCSA has the burden of proving that the decision is erroneous. Tetlin Native Corp., 86 IBLA 325, 335 (1985); Doyon, Limited, 74 IBLA 139, 142, 90 I.D. 289, 291 (1983). While Tanana asserts the right-of-way should be widened to facilitate safe use of the existing road, Tanana has not offered sufficient evidence to justify the special circumstances variance of 43 CFR 2650.4-7(a)(4). Therefore, BLM's decision to reserve the 60-foot-wide easement was proper.

Tozitna argues that the easement reservation for that part of the Tanana-Allakaket trail, known as EIN 1b, should be 25 feet wide, rather than 50 feet wide. According to Tozitna, historically the trail was a winter trail used for dogsled travel between Tanana and the Village of Allakaket. Tozitna states that during the summer the trail has little or no use, although during the winter it is still used for travel by dogsled and occasionally by snowmobile. Tozitna states that large all-terrain vehicles, track vehicles, and four-wheel-drive vehicles do not use EIN 1b. Tozitna argues that the trail uses permitted by regulation on a 50-foot-wide path would have a serious detrimental effect on local wildlife, thus affecting subsistence, hunting, and trapping by its members.

Counsel for BLM notes that under 43 CFR 2650.4-7(b), the permitted uses of a 25-foot trail and a 50-foot trail are similar, except that a 25-foot trail may not be used for four-wheel drive vehicles, and all-terrain vehicles must be under 3,000 pounds gross vehicle weight (GVW). BLM contends that the trail is used by four-wheel-drive vehicles for access to public lands and 20 to 40 private settlement claims, and a 25-foot trail, on which four-wheel-drive vehicles may not travel, would be inappropriate. BLM also quotes an October 12, 1978, letter from the State of Alaska in which the State notes that the existing access trail is used by all-terrain vehicles with a GVW exceeding 3,000 pounds. Since Department regulations would prohibit this use on a 25-foot trail, BLM concludes that a 50-foot wide easement is warranted.

Finally, BLM notes that practicality dictates that the easement reservation be 50 feet wide. BLM notes that EIN 1a is 60 feet wide. This easement connects with EIN 1b, which runs through sec. 17, and then connects with another easement which is 50 feet wide. BLM states: "The consequence of reducing the trail easement to 25 feet in section 17 would be the creation of a short 25-foot wide bottleneck connecting a 60-foot wide road to a 50-foot trail" (Answer at 5).

[3] As previously stated, when a party appeals a BLM decision respecting the reservation of an ANCSA easement, the appealing party bears the burden of proof of showing that the decision is erroneous. Tetlin Native Corp., 86 IBLA at 335; Doyon, Limited, 74 IBLA at 142, 90 I.D. at 291. BLM has found the 50-foot trail easement reservation necessary to accommodate the uses presently existing on the trail as identified by the State and BLM. Tozitna has failed to show that BLM erred in its decision to reserve a 50-foot easement for EIN 1b. Therefore, we affirm BLM's decision as to the width of EIN 1b.

Finally, Tozitna argues that it is inappropriate for BLM to state in its decision: "This easement is subject to the State of Alaska's claimed R.S. 2477 right-of-way if valid, for the Tanana-Allakaket Trail" (SOR at 3). Tozitna's SOR noted this precise issue was before the Board in another case and stated, "Rather than rebrief and reargue the issue, Tozitna suggests that this issue be held in abeyance pending the outcome in the other two identified cases" (SOR at 4).

Doyon, Limited, appears before the Board as amicus curiae, arguing against inclusion of the above referenced "R.S. 2477" language in BLM's decision and arguing that it has a clear and substantial interest in the outcome of this appeal because the subsurface estate to this land will be conveyed to Doyon.

Doyon argues that nothing in ANCSA, or other laws, requires that BLM identify the possible existence of an R.S. 2477 easement in the conveyance document. Doyon states that, although 43 U.S.C. § 1613(g) (1982), requires that valid existing rights be noted in conveyances, mere claims of an R.S. 2477 right-of-way are not valid existing rights. Doyon further argues that, like unadjudicated mining claims which are not noted in conveyance documents, reference to unadjudicated R.S. 2477 claims should be omitted. Doyon submits that there is no rational reason to differentiate between unadjudicated mining

claims and R.S. 2477 rights-of-way; both are protected by language in the conveyance documents which provide that conveyances are subject to valid existing rights, if any.

[4] In the cases previously noted, Alaska Department of Transportation, 88 IBLA 106 (1985), Doyon raised the same arguments as in the instant appeal. Our holding in that case is equally applicable to the instant case. In Alaska Department of Transportation we concluded that where a section 17(b) easement overlaps a claimed R.S. 2477 right-of-way, BLM is required to note that the reserved public easement is "subject to the claimed R.S. 2477 right-of-way, if valid" on the conveyance document. Id. at 109.

BLM must identify claimed R.S. 2477 rights-of-way in conveyance documents, even though it does not identify unadjudicated mining claims in these documents. Doyon, Limited, supra. We draw a distinction between claimed R.S. 2477 rights-of-way and unadjudicated mining claims because mining claims are expressly protected by ANCSA, 43 U.S.C. § 1621(c) (1982). Other types of preexisting rights required to be identified under section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982), such as claimed R.S. 2477 rights-of-way, are not, however, afforded similar statutory protection. Thus, for unadjudicated mining claims, "No notation is required in the conveyance because the mining claimants' interest is protected by statutory provision. However, ANCSA contains no such provision concerning R.S. 2477 claims." Alaska Department of Transportation, 88 IBLA at 109.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Anita Vogt
Administrative Judge
Alternate Member

James L. Burski
Administrative Judge